REPORT

ON

DAMAGES FOR ENVIRONMENTAL HARM

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

1990

REPORT

ON

DAMAGES FOR ENVIRONMENTAL HARM

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

1990

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

Commissioners

Rosalie S. Abella, BA, LLB, *Chair*

Richard E.B. Simeon, BA (Hon), MA, Ph.D, *Vice Chair*

Earl A. Cherniak, QC, BA, LLB

J. Robert S. Prichard, MBA, LLM

Margaret A. Ross, BA (Hon), LLB

General Counsel and Director of Research

Melvin A. Springman, MA, MSc, LLB

Senior Counsel

Larry M. Fox, LLB

Counsel

Judith A. Bellis, BA, LLB

J. Jody Morrison, BA (Hon), LLM

Ronda F. Bessner, MA, LLB

Christine B. Henderson, BA, LLB

Secretary and Administrative Officer

Anne McGarrigle, LLB

The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1.

Copies of this report may be purchased from the Ontario Government Bookstore, 880 Bay Street, Toronto, or by mail order from Publications Services Section, 5th Floor, 880 Bay Street, Toronto, Ontario M7A 1N8. Telephone (416) 326-5300. Toll free long distance 1-800-668-9938.

ISBN 0-7729-6607-9

EXECUTIVE SUMMARY

In its *Report on Damages for Environmental Harm*, the Ontario Law Reform Commission recommends the creation of a new statutory remedy for the protection of the environment—an award of civil damages payable to compensate the public for harm done to the environment, entirely independent of any damages that may be payable for private injury suffered by individuals or corporations.

Under the Commission's proposals, this new remedy would be available not only to the Crown, but to individuals and groups who would have the right to bring proceedings under the more liberal standing rule proposed by the Commission in its 1989 *Report on the Law of Standing*. Even an individual without a special personal, proprietary, or pecuniary interest in the proceeding may seek this remedy for the benefit of the public in the larger interest of protecting the environment. Such an individual may enjoy the benefit of the favourable costs rules that we recommended in the Standing Report, which recognized that, without fundamental change to the law of costs, any reform of the law of standing would be ineffective.

The Commission's endorsement of the new damages remedy follows from two basic premises: first, there may exist a public or general harm in the environmental context that is independent of any injury suffered by individuals personally; and second, individuals may have a legitimate stake in taking action responsive to this harm, even though they are not directly affected.

The introduction of a civil damages remedy would give courts needed flexibility in choosing the appropriate remedy when proceedings are brought in relation to pollution and other environmental injury. The Commission's view is that courts should be able to choose between injunctions and damages where harm to the environment is caused. It recommends that, in deciding whether to order an injunction or damages in connection with environmental harm, the court should be required to balance all the relevant factors, including the public interest in the protection of the environment, the impact on the defendant, and the social and economic consequences of each remedy.

Under the Commission's proposals, a court may order damages for environmental harm for a past injury. In addition, damages in connection with a harm continuing into the future may be ordered instead of an injunction, or where a court postpones the operation of an injunction or orders a partial injunction.

In the report, much attention is given to the difficult problem of deciding how damages for environmental harm should be assessed by courts.

The Commission reviews a number of methodologies, and considers the advantages and disadvantages of each. The relevant literature suggests a consensus among economists that, although certain methodologies ought to be employed in the vast majority of cases, no single method can be endorsed as suitable in all circumstances.

Natural resources have both use value and intrinsic or non-use value. Use value is based on the use to which natural resources may be put for practical human ends. By contrast, intrinsic value places a value on the preservation or continuing existence of natural resources. The Commission takes the view that courts ought to recognize both use value and intrinsic value in assessing damages for environmental harm, in the belief that it is the sum of these two values that more completely represents the true extent of the environmental loss.

Accordingly, the Commission recommends that, in assessing damages for environmental harm, there should be a rebuttable presumption in favour of the assessment methodologies that take account of both use and intrinsic values. Where this presumption is rebutted, a court may utilize the other methods discussed by the Commission, which focus primarily on use value.

The final question considered in the report is to whom, and for what purposes, the damages are to be awarded, given that the plaintiff is not seeking them for his or her own personal injury, but for the harm caused to the environment generally. The Commission recommends that an award of damages for environmental harm should be given to a special government body, with an explicit mandate to administer the award, rather than to the plaintiff.

What the government body must do with the award depends on the method of damages assessment used by the court. It may be required to use the funds to restore or replace the affected site, or to rehabilitate the environment generally, in any manner the government body deems appropriate.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

THE NEW DAMAGES REMEDY (CHAPTER 2)

1. Legislation should be enacted to create a new civil remedy, an award of damages payable to compensate the public for harm done to the environment, entirely independent of any damages payable for injury caused to individuals or corporations.

2. (a) The new civil damages remedy should be available to any person who has standing. (See the Commission's 1989 *Report on the Law of Standing*.)

   (b) This remedy should be available to the Crown in right of Ontario.

3. The harm for which damages may be awarded should include a past injury. In addition, a court should be able to award damages in lieu of an injunction in connection with a future harm. Moreover, where a suspended injunction or a partial injunction is ordered, the injury that, by definition, will be permitted to continue, either in whole or in part, should be the basis for an award of damages.

4. In determining whether to order an injunction or damages in connection with environmental harm, the court should be required to balance all the relevant factors, including the public interest in the protection of the environment, the impact on the defendant, and the social and economic consequences of each remedy.

THE ASSESSMENT OF DAMAGES FOR HARM TO THE ENVIRONMENT (CHAPTER 3)

5. A rebuttable presumption should exist in favour of restoration cost, replacement cost, and contingent valuation. Where the presumption is rebutted, the court may utilize market valuation, the hedonic price method or travel cost valuation to assess damages for harm caused to the environment.

ADMINISTRATION OF THE DAMAGES AWARD (CHAPTER 4)

6. The court should be required to give the award of damages to a government body, which should have the statutory duty to use it in accordance with recommendation 9.

7. Where an action is brought seeking damages for environmental harm, notice of the proceedings should be given to both the Minister of the Environment and the Minister of Natural Resources. Further notice should be given to such other Minister as the court directs.

8. Where a court awards damages for environmental harm, it should order, in addition, the estimated administrative costs associated with restoration or replacement, as the case may be.

9. The government body, referred to in recommendation 6, should have the following mandate:

   (1) where the court assesses damages for environmental harm by the restoration cost method or the replacement cost method, to effect restoration or replacement, as the case may be, in any manner it deems appropriate; and

   (2) in all other cases, to apply the award to rehabilitate the environment in any manner it deems appropriate.

10. Legislation should be enacted that would ensure that, where damages are paid to the government body, they shall be applied only for restoration, replacement, or rehabilitation (and for no other purpose), in accordance with recommendation 9.

RAPPORT

SUR

LE RECOURS EN DOMMAGES-INTÉRÊTS POUR DÉTÉRIORATION DE L'ENVIRONNEMENT

Commission de réforme du droit de l'Ontario

SOMMAIRE

Ontario

1990